

The Honorable Thomas S. Zilly

CV 02-02183 #00000035

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AT SEATTLE
 CLERK U.S. DISTRICT COURT
 WESTERN DISTRICT OF WASHINGTON
 DEPUTY

BY

**UNITED STATES DISTRICT COURT
 WESTERN DISTRICT OF WASHINGTON
 AT SEATTLE**

JOEL HODGELL, an individual

Plaintiff,

v

MEMOLINK, INC., a New York
 corporation, TRIFECTA ADVERTISING,
 LLC, a Colorado limited liability company,
 MINDSHARE DESIGN, INC., a California
 corporation, TOPICA, INC., a California
 corporation

Defendants

NO. C02-2183Z

MOTION FOR ATTORNEYS' FEES
 AND REQUEST FOR
 PUBLICATION

NOTE ON MOTION CALENDAR
 March 28, 2003

I. INTRODUCTION

Defendants Mindshare Design, Inc. ("Mindshare") and Topica, Inc. ("Topica") move the Court for an award of the attorneys' fees pursuant to RCW § 4.28.185(5). Additionally, because the Court's February 19, 2003, Order (Dkt # 32) (hereinafter the "Order") rules on a matter of law of substantial significance to Application Service Providers ("ASPs") and regards the application of personal jurisdiction to an emerging area of law that has not been the subject of a published opinion in the federal courts, the Defendants respectfully request that the Court publish the Order.

ORIGINAL

35

1 **II. ISSUES PRESENTED**

2 A. Whether attorneys' fees should be granted pursuant to RCW § 4 28.185
3 when two ASPs with no contact with Washington are haled into a Washington court.

4 B. Whether the Court should publish the Order
5

6 **III. ARGUMENT AND AUTHORITY**

7 A Washington Law Provides for an Award of Defendants' Attorneys' Fees

8 The Washington Long-Arm statute provides for an award of attorneys' fees where
9 a defendant is dismissed for lack of personal jurisdiction ¹ RCW § 4 28.185 states, in
10 pertinent part, that

11 (5) In the event the defendant is personally served outside the state on causes of
12 action enumerated in this section, and prevails in the action, there may be taxed
13 and allowed to the defendant as part of the costs of defending the action a
reasonable amount to be fixed by the court as attorneys' fees

14 Washington Courts regularly award attorneys' fees to defendants who are dismissed for
15 lack of personal jurisdiction. *See, e g, CTVC of Hawaii, Co, Ltd v Shinawatra*, 82 Wn.
16 App 699, 722, 919 P 2d 1243 (1996); *Walker v Bonney-Watson Co*, 64 Wn App. 27,
17 36, 823 P.2d 518 (1992).

18 In the present matter, the Court dismissed Topica and Mindshare from this matter
19 on the grounds that

20 Plaintiff failed to produce any evidence that defendant Mindshare did more than
21 provide e-mail delivery technology and software to customers, a passive action that
22 is not sufficient to establish personal jurisdiction over Mindshare Similarly, the
plaintiff failed to produce any evidence that defendant Topica did more than
provide e-mail delivery technology and software to its customers, a passive action
that is not sufficient to establish personal jurisdiction over Topica

23 Order at p 9 As the Court conclusively ruled, Plaintiff should not have filed the
24 underlying claims against these Defendants in Washington.
25

26 ¹In considering a motion for attorneys' fees, the Court looks to applicable state law "[I]n an ordinary diversity case
27 where the state law does not run counter to a valid federal statute or rule of court, and usually it will not, state law denying the right
to attorneys' fees or giving a right thereto, which reflects a substantial policy of the state, should be followed " *Alyeska Pipeline*
28 *Service co v Wilderness Society*, 421 U S 240, 259, 95 S Ct 1612, fn 31 (1975) (citing, 6 J Moore, Federal Practice P 54 77 [2],
pp 1712-1713 (2d ed 1974) and 2 S Speiser, Attorneys' Fees § § 14 3, 14 4 (1973), Annotation, Prevailing Party's Right to
Recover Counsel Fees in Federal Courts, 8 L Ed 2d 894, 900-901), *See also, Bevard v Farmers Ins Exchange*, 127 F 3d 1147,
1148 (9th Cir 1997)

1 Moreover, as the record (and the Court's docket) reflects, Plaintiff is in the
2 practice of filing multiple lawsuits under Washington's Unsolicited Commercial Email
3 ("UCE") law, RCW § 19.190. In at least one case, a Washington court issued a judgment
4 against Mr. Hodgell pursuant to RCW § 4 28.185(5). *See November 7, 2003 Townsend*
5 *Decl. (Dkt # 5), at ¶ 2, Exhibit A*. Plaintiff knew or should have known that personal
6 jurisdiction was not proper against an ASP that had no contact with Plaintiff and merely
7 provided software for the distribution of email by third parties. Moreover, Plaintiff
8 refused to disclose his email addresses upon request from counsel, *see Declaration of Ted*
9 *Bernard (Dkt # 20), at ¶ 15, and Second Declaration of Ted Bernard at (Dkt # 30) ¶14-*
10 *16, or avail himself of established and effective means to prevent receipt of emails from*
11 *Defendants because he was "not required by any law or regulation to 'unsubscribe' or*
12 *'remove' [his] email addresses from any spammer's spam list(s)." See Hodgell Decl. (re*
13 *Reconsideration) at ¶ 10*. This conduct constitutes bad faith and has cost Defendants
14 substantial amounts in attorneys' fees and costs, which should properly be borne by
15 Plaintiff.

16 Accordingly, Defendants respectfully request an award of reasonable attorneys'
17 fees incurred to defend in this action pursuant to RCW § 4 28.185(5). In the event the
18 Court grants this motion, Defendants will submit an attorneys' fees declaration providing
19 for the amount of reasonable fees.

20
21 B. Publication Will Provide Valuable Guidance and is in the Public's Interest

22 Unsolicited commercial email (UCE) laws are an emerging area of litigation. To
23 date, 26 states have passed laws regulating the distribution of UCE². As the Order
24 recognizes, the application of personal jurisdiction doctrine to UCE has not been the
25 subject of a published opinion. As a result, ASPs are required to defend litigation in
26

27
28 ²Currently, there are no federal laws regulating UCE. The states which have passed laws regulating UCE are Arkansas, California, Colorado, Connecticut, Delaware, Idaho, Illinois, Iowa, Kansas, Louisiana, Maryland, Minnesota, Missouri, Nevada, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Virginia, Washington, West Virginia, Wisconsin.

1 forums across the country even where jurisdiction is clearly improper. Currently, UCE
2 Plaintiffs can allege that traditional personal jurisdiction analysis does not apply because
3 the Internet is available globally Publication of the Order will provide guidance on
4 personal jurisdiction against ASPs

5
6 **IV. CONCLUSION**

7 For the foregoing reasons, Defendants Mindshare and Topica respectfully request
8 the Court for (i) an award of reasonable attorneys' fees pursuant to RCW § 4 28 185(5)
9 and (ii) to publish the Order

10
11 DATED this 13th day of March 2003

12 Respectfully Submitted,

13
14 NEWMAN & NEWMAN,
ATTORNEYS AT LAW, LLP

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16
17 By:



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21 Attorneys for Defendants
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1 **CERTIFICATE OF SERVICE**

2 The undersigned hereby certifies that on this 13th day of March 2003, I caused the
3 foregoing **MOTION FOR ATTORNEYS' FEES AND REQUEST FOR PUBLICATION;**
4 **PROPOSED ORDER RE MOTION FOR ATTORNEYS' FEES AND REQUEST FOR**
5 **PUBLICATION AND CERTIFICATE OF SERVICE** to be served via the methods listed below on
6 the following
7 parties:

8 **Via U.S. MAIL AND FAX to**

9
10 Dietrich Biemiller, Esq
11 Law Offices of Dietrich Biemiller
12 8420 Dayton Avenue North
13 Seattle, WA 98103

14
15 Fax (206) 297-5990

16 I declare under penalty of perjury under the laws of the United States and the State of
17 Washington that the foregoing is true and correct and that this declaration was executed on March 13th
18 2003, at Seattle, Washington.

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20 Diana Au

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CERTIFICATE OF SERVICE

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